Toffoloni v. LFP Publishing Group, LLC Doc. 75 Att.

HALLMAN & WINGATE
LLC
ATTORNEYS AT LAW

RICHARD P. DECKER
OF COUNSEL
*ALSO ADMITTED IN VIRGIN ISLANDS

(404) 588-2522 DIRECT
(404) 588-2530 MAIN
(404) 588-2535 FACSIMILE
rdecker@hallmanwingate.com

166 ANDERSON STREET, S.E.
SUITE 210
MARIETTA, GEORGIA 30060
www.hallmanwingate.com

December 9, 2009

VIA ELECTRONIC MAIL
ORIGINAL TO FOLLOW
BY REGULAR MAIL

S. Derek Bauer, Esq.
McKenna, Long & Aldridge
303 Peachtree Street, N.E.
Suite 5300
Atlanta, GA 30308

Re: Toffoloni v. LFP Publishing Group, LLC
United States District Court
Northern District of Georgia
Case No. 1:08-CV-0421-TWT
HW File No. 3197/007

Dear Derek:

I have reviewed Defendant LFP Publishing Group, LLC's Responses to Plaintiff's First Interrogatories and Request for Production of Documents, filed on November 30, 2009.

Specifically, I am writing with regard to Defendant's refusal to respond to Interrogatory number 2, concerning LFP's profit and loss and/or operating statements for 2006-2009, Interrogatory numbers 7, 8, and 9, concerning the disclosure of Defendant's and its parent companies' net worth for the years ending 2006, 2007, 2008, and 2009 to date, Interrogatory number 14, concerning disclosure of payment amounts to models, celebrities, actors or other performers or private individuals for use of nude images from 2006 until the present, and responses to Request for Production of Documents numbers 2 through 8, regarding these same issues.

EXHIBIT A

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This letter fulfills Plaintiff's good faith duty to confer with opposing counsel to settle discovery disputes as required by Norther District of Georgia Local Rule 37.1(A)(1) and Federal Rules of Civil Procedure 37(a)(1).

1. Interrogatory Numbers 2, 7, 8, and 9 and Request for Production of Documents Numbers 2 Through 7 Concerning Financial Documents and Punitive Damages.

Defendant raises two objections in its response to justify refusal to produce the requested documentation relating to the operating statements of LFP and the net worth of Defendant and its parent companies. The first objection is that punitive damages are not proper in this case, while the second objection is that, even if punitive damages are proper, the requested information may not be introduced as evidence to determine the amount of punitive damages. However, a request for punitive damages has been properly pled in Plaintiff's Verified Complaint, and such an award is supported by the facts of this case. In addition, the scope of discovery is more broad than simply "admissible evidence," and net worth may in fact be submitted as evidence in a punitive damage award. For these reasons, Defendant's refusal to produce such documentation is improper, and Plaintiff will seek a motion to compel such discovery, as well as attorneys' fees incurred in drafting such motion, if Defendant does not produce the requested documentation.

a. Punitive Damages Are Proper.

Defendant was fully aware at the time of publication that publishing nude photographs of Nancy Benoit was a clear violation of Plaintiff's right of publicity. As you know, I had warned counsel for Defendant, through my January 16, 2008 letter and Plaintiff's Motion for Temporary Restraining Order, filed February 5, 2008. In the Motion and accompanying Brief in Support, Plaintiff clearly lays out the law concerning the right of publicity, and why the publication of the pictures in question are a clear violation of those rights. Despite Plaintiff's warnings, Defendant displayed "willful misconduct" and "entire want of care which would raise the presumption of conscious indifference to consequences" by nevertheless publishing the disputed photographs. *See* O.C.G.A. § 51-12-5.1. The evidence presented by Plaintiff in her Motion for Temporary Restraining Order, as well as correspondence from myself to Defendant's counsel, put Defendant on notice that the proposed conduct was unlawful, yet Defendant heedlessly proceeded with such conduct. This is the very definition of "willful misconduct" and "want of care" that merits the award of punitive damages.

In addition, Plaintiff properly prayed specifically for punitive damages in her Verified Complaint, as required by O.C.G.A. § 51-12-5.1(d)(1). See Plaintiff's Complaint, ¶30. It is well-established law that a jury may award punitive damages in a right of publicity case. See Alonso v. Parfet, 253 Ga. 749, 750 (1985), where the court ruled that punitive damages may be awarded "to discourage the 'inverse condemnation' of a name."

Cabaniss v. Hipsley, 114 Ga. App. 367 (1966), cited by Defendant in support of its argument that punitive damages are not proper in this case, deals only with the *right of privacy*, and does not address Georgia's right of publicity laws. Id. at 370. In addition, Cabaniss dealt with mistaken identity in the production of disputed photographs, and as such, punitive damages were not authorized. "Mere negligence on the part of officers or agents of defendant On The Town, Inc., in delivering plaintiff's photograph for publication instead of the photograph of the actual performer, would not justify an award of punitive damages. If, however, on another trial the jury should find that ... defendant's acts and conduct were ... premeditated, ... an award of punitive damages would be authorized." Id. at 368.

In the case at hand, Defendant's publication was not negligent, but purposeful and willful, especially given Plaintiff's warnings that the publication of such photographs is contrary to the law of the right to publicity. Therefore, this case is completely distinguishable from Cabanis, and punitive damages are warranted.

b. Financial Documents Are Both Discoverable and Relevant.

The second argument presented in Defendant's Response for refusing to comply with Interrogatory numbers 2, 7, 8 and 9 is that the Plaintiff is not entitled to discovery of Defendant's general financial status for the purposes of punitive damages.

As I am sure Defendant's counsel is aware, there is a great difference between "discoverable material" and "admissible evidence." The scope of what constitutes discoverable material, which must be submitted in response to an interrogatory request absent privilege, is very broad and includes anything that is "reasonably calculated to lead to the discovery of admissible evidence," regardless of whether the submission of such material would be inadmissable at trial. See O.C.G.A. § 9-11-26. Plaintiff is not, at this time, seeking to submit documentation of Defendant's net worth as admissible evidence. Instead, Plaintiff seeks the requested material because it is, at the very least, reasonably calculated to lead to the discovery of admissible evidence for the purposes of determining general and punitive damages.

Courts traditionally construe discovery requests very broadly and in favor of the production of requested information and full disclosure. See Sechler Family Partnership v. Prime Group, Inc., 255 Ga. App. 854, 859 (2002), where the court, quoting Clayton County Bd. of Tax Assessors v. Lake Spivey Golf Club, 207 Ga. App. 693 (1993), found that "[t]he discovery procedure is to be given a liberal construction in favor of supplying a party with the facts without reference to whether the facts sought are admissible upon the trial of the action." In Sechler, the plaintiff requested discovery of documents detailing the financial status of third-party federal bank. The court found that the discovery request was calculated to lead to admissible evidence, even if the documents themselves were inadmissable, and that the confidentiality order entered by the court prevented any undue invasion of privacy. Id at 859.

In addition, such documentation of net worth and financial status may well constitute admissible evidence in a determination of actual, as well as, punitive damages. Punitive, or exemplary, damages are based upon the aggravated nature of a defendant's conduct and serve to punish the defendant and deter others from similar conduct. Carter v. Spells, 494 S.E.2d 279 (1997); Southeastern Sec. Ins. Co. v. Hotle, 473 S.E.2d 256 (1996). There are three guidelines set forth by the United States Supreme Court when determining the constitutionality of punitive damages: the degree of reprehensibility of the action; the ratio of the punitive award with the actual compensatory award; and the relationship of the punitive damage award with comparable civil penalties authorized in similar cases. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996).

Defendant claims in its Response to Interrogatories that "plaintiffs may not introduce evidence of defendant's net worth, wealth, or financial condition generally" (citing Dimaso v. Ford Motor Co., 2003 WL 22850075 (2003)). However, this is simply not the case. Evidence of a defendant's net worth or wealth may not overcome an otherwise unconstitutionally excessive award, however, such material may be properly considered when determining an award amount.

In his concurring opinion in BMW, Justice Breyer claims that the financial position of the defendant must be considered when determining a punitive damage award. "[A] fixed dollar award will punish a poor person more than a wealthy one," so that the wealth of the defendant must be taken into account when determining punitive damages. BMW at 591. Because one of the goals of punitive damages is to punish the defendant, the court must look to the financial status of the defendant to determine an amount that will adequately punish the defendant's conduct.

If Defendant has concerns of the sensitive business nature of the material requested, Plaintiff would be willing to sign a confidentiality agreement or consent to a protective order to ensure that such material is not released to the public. However, it is clear that Plaintiff has a right to review such documentation, as it may lead to discoverable evidence, and it is relevant to the issue of punitive damages.

2. Interrogatory 14 and Request for Production of Documents 8 Concerning Payment to Other Models, Celebrities, Actors or Other Performers or Private Individuals.

Defendant objected to the disclosure of information regarding payments made to other models, celebrities, actors or other performers or private individuals for the use of nude photographs in *Hustler* magazine, based upon the request being overbroad, seeking information of non-parties, and seeking information that is private, confidential, non-public financial information that is not probative to any issue in this case. Plaintiff disagrees.

The payments made to other celebrities, actors and performers gives the court a solid basis for the determination of actual damages sustained by Plaintiff for failure of Defendant to pay for the disputed photographs. The sales of the magazine alone is not determinative of the damages sustained by Plaintiff, as in several instances, the amount paid to a high profile celebrity may be more than the amount made by the issue itself. If there is a disparity in the nature, quality and value of the disputed photographs and other photographs used in the publication, such evidence may be presented by Defendant at the appropriate time. However, the information requested in Plaintiff's Interrogatory number 14 and Request for Production of Documents number 8 is probative, and "reasonably calculated to lead to the discovery of admissible evidence." *See* O.C.G.A. § 9-11-26.

Defendant's response to Interrogatory number 14 states that it is willing to meet and confer with counsel for Plaintiff to discuss the scope of the request and a possible protective order. I am willing to discuss such matters at your earliest convenience.

You have also indicated that LFP will produce documents showing the amount of money paid to Mark Samansky for the Nancy Benoit images; and its documentary files regarding the decision to publish said images. However, no such documents were produced. Please produce these without further delay.

Please provide a response to this letter by Wednesday, December 16, or I will have no other recourse but to file a Motion to Compel Discovery and seek attorneys' fees.

Yours very truly,

Richard P. Decker

For HALLMAN & WINGATE, LLC

RPD:zmw

c: Ms. Maureen Toffoloni

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